



Franchising Alert March 2010

Government announces additional disclosure requirements

The expert panel established by Federal Minister Dr Craig Emerson in November 2009 to look at specific behaviours that might be considered inappropriate in a franchising arrangement handed down their findings in a joint report in February 2010.

The detailed report, entitled 'Strengthening statutory unconscionable conduct and the Franchising Code of Conduct' is in excess of 100 pages and responds to specific terms of reference provided by the Government.

David Lieberman, a Consultant in Thomson Playford Cutlers' franchising and competition group, was a member of the 3 person Expert Panel and co-author of the Report.

Recommendations of the Expert Panel

On 3 March 2010 the Minister released the joint report and announced the Government accepted the Expert Panel's recommendations. This will require amendments to the Franchising Code of Conduct (*Code*) and Trade Practices Act (*TPA*).

The changes recommended by the Expert Panel include:

1. Additional disclosure document:

The development of a 'short, simple, "Plain English" document' which is to be voluntarily provided by franchisors to potential franchisees as a ready reference to the nature of the franchise relationship.

This document will be in addition to the Code's current disclosure document.

There has been no mention of the form of the document and no indication of the stage at which the "Plain English" document should be provided to the potential franchisee, other than 'earlier in the process of entering a franchise agreement' and before they become 'psychologically, financially and legally committed to entering a franchise agreement';

2. Unilateral variations to the franchise agreement:

There should be greater or additional disclosure by franchisors of circumstances

where unilateral variations to franchise agreements can occur and circumstances in which the franchisor has unilaterally varied a franchise agreement in the past 3 years;

3. Unforeseen capital expenditure:

Franchisors will be required to disclose whether there will be significant capital expenditure by the franchisee towards the end of the franchise term, and whether that would be a factor to be considered in end of term arrangements including on a renewal, and whether that has been a factor in the past;

4. Confidentiality agreements:

Whilst the Expert Panel recognised the need for confidentiality agreements for the protection of intellectual property, they recommended that there be disclosure to prospective franchisees of categories of information that cannot be discussed with existing and former franchisees, including 'the outcomes of mediations, settlements, intellectual property and trade secrets';

5. Legal costs:

The Expert Panel was concerned with the use of legal costs clauses for inappropriate purposes. They supported improved disclosure up front of the cost attribution of dispute resolution, to enable franchisees to better weigh the risks and rewards of entering a particular franchise system;

6. Sale of franchise business:

The Expert Panel recognised the reasons why a franchisor should have the right to amend a franchise agreement on renewal or on the transfer of the franchise business. However they recommended that the Code be amended to require disclosure that in situations where a franchisee is selling the franchise business, the franchisor may require that the franchise agreement to be signed by the buyer be amended to that as earlier signed by the seller;



7. Unconscionable conduct:

The TPA is to be amended to include interpretative provisions as to unconscionable conduct so as to assist courts in interpreting them, stakeholders in understanding them, and regulators in enforcing them. The Expert Panel found that a list of examples would not assist understanding of these principles. It was also recommended that regulators run some test cases; and

8. Dispute resolution processes:

Governments should give consideration to harmonisation of dispute resolution services for small business around Australia.

November 2009 recommendations

These proposed amendments to the Code are in addition to the proposed amendments to the Code and TPA already indicated by the Minister in November 2009 (the subject of our November

2009 Franchising Alert). To recap, those amendments dealt with:

- end of franchise term arrangements;
- dispute resolution
- penalties for corporations or individuals in unconscionable conduct or making false or misleading representations;
- random audits of franchise systems by the ACCC; and
- public warnings by the ACCC about rogue franchisors.

Comencement date for amendments

The actual amendments have not yet been drafted by the Federal Government. The Minister has not indicated when these amendments are likely to become effective. At this stage we anticipate the amendments coming into effect in the second half of 2010. A further Franchising Alert will be sent to you once the date is advised.

What does this mean for you?

Despite many commentators suggesting a win for franchisors there is no doubt the proposed amendments will be significant in number and extent. Disclosure will be more onerous and this will involve cost at the franchisor's end. Existing franchise agreements and disclosure documents will need to be amended once the amendments to the Code are known.

Franchisors also need to be aware that the new "Plain English" document will need to be drafted and given to potential franchisors as a part of the disclosure process.

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